



PPP DISPUTE RESOLUTION CENTRE AT UN ECE

Dr Wim A Timmermans, International PPP Expert, Member of UN ECE Business Advisory Board, Advocate, Leiden, The Netherlands



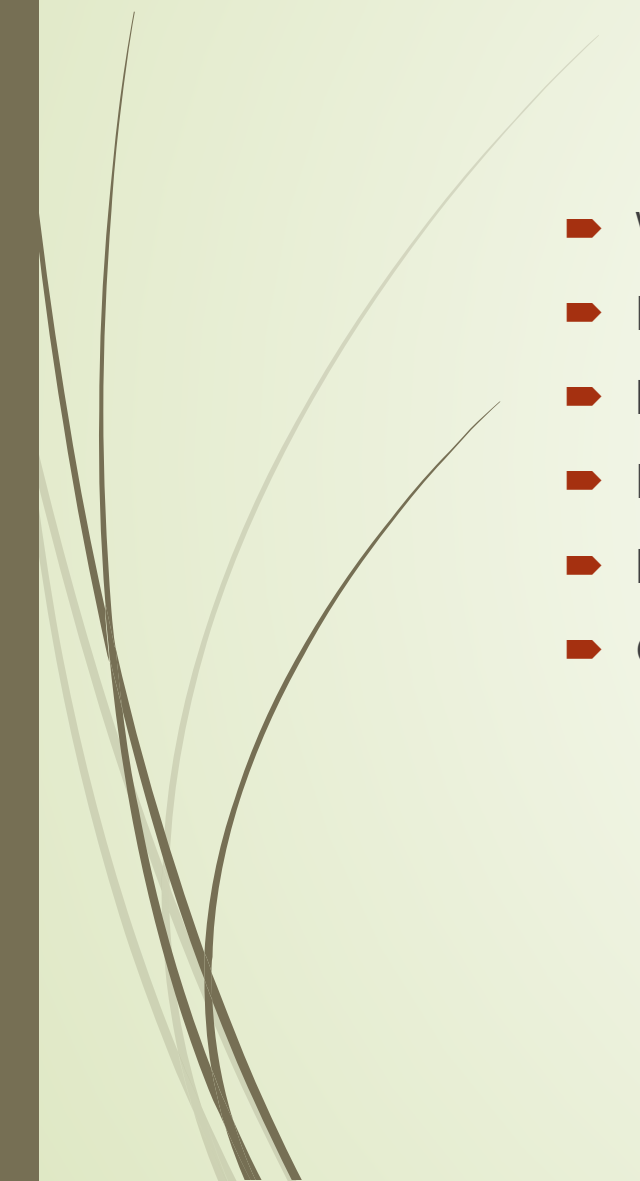
Introduction



- ▶ Aim of this presentation:
 - ▶ to highlight the need for a special tribunal for the settlement of disputes arising out of or in connection with PPPs
 - ▶ To indicate what is needed for such a tribunal
 - ▶ To specify what steps must be taken



Issues to be discussed

- Why a special PPP dispute resolution centre is needed
 - Practicalities
 - Investor State Dispute Settlement
 - Prevention of disputes
 - Further steps to be taken
 - Conclusions
- 



Why a special tribunal for resolution of disputes related to PPPs is needed

- ▶ In recent years, a certain tendency towards special arbitration institutes can be seen
- ▶ Examples of such specialized arbitration institutes include:
 - ▶ International Centre for Energy Arbitration (ICEA), Edinburgh
 - ▶ PRIME Finance (Panel of Recognized International Market Experts in Finance), The Hague
 - ▶ TAMARA (Transport and Maritime Arbitration Rotterdam-Amsterdam)
- ▶ PPPs have their own very special characteristics
- ▶ PPPs have three pillars: financial – construction – legal
- ▶ Therefore, a specialized dispute settlement centre would fill a gap



What is needed for a PPP Dispute Resolution Centre?

- ▶ Some preliminary ideas:
 - ▶ Under the aegis of UN ECE
 - ▶ Based in Geneva (UN seat) or The Hague (seat of ICJ and PCA; 'legal capital of the world')
 - ▶ Arbitrating under UNCITRAL Rules (as revised in 2010)
 - ▶ Governing bodies: advisory board – management board – secretariat
 - ▶ List of experts
 - ▶ If based in The Hague, disputes could be administered by PCA



Investor-State Dispute Settlement (ISDS)

(I)

- ▶ Recently, criticism regarding ISDS has been raised
- ▶ Main arguments contra ISDS
 - ▶ State sovereignty is at stake
 - ▶ Strong private investors can sue state bodies
 - ▶ In the case of poor countries, there may be a misbalance
 - ▶ Private investors may cause states to go bankrupt (Argentina)
 - ▶ States may be cut off international funding as a result
 - ▶ As a rule, arbitrators are internationally practicing lawyers and not always perceived by the host State as independent



Investor-State Dispute Settlement (ISDS)

(II)

- ▶ Arguments pro ISDS
 - ▶ It guarantees a fair procedure
 - ▶ In many cases, state courts of the country concerned are not well-suited to hear complex disputes involving foreign parties
 - ▶ As rule, International Financial Institutions demand dispute settlement outside the country concerned
 - ▶ Also, investors themselves will demand ISDS



ISDS in EU Investment Treaties (I)

- ▶ Also, in the Transatlantic Trade Investment Partnership Treaty (TTIP) that is currently negotiated between the USA and the European Union, a lot of criticism has been raised regarding the ISDS mechanism in the draft text of the Treaty
- ▶ In September 2015, the European Commission published a proposal for setting up a new Investment Court System
- ▶ Main features of the proposed Investment Court System
 - ▶ Partly modelled after WTO Appellate Body
 - ▶ Composed of first instance Tribunal and Appeal tribunal
 - ▶ Publicly appointed judges
 - ▶ Grounds for suing states would be precisely defined and limited to specific events such as discrimination, expropriation without compensation, denial of justice



ISDS in EU Investment Treaties (II)

- ▶ Principles proposed by EC for Investment Court System
 - ▶ Transparent proceedings: open hearings, comments on line available, intervention by interested third parties
 - ▶ No forum shopping allowed
 - ▶ No frivolous claims
 - ▶ Distinction between international and domestic law will be preserved
 - ▶ Avoidance of multiple and parallel proceedings
- ▶ EU/US Investment Court should be a model for a future International Investment Court



ISDS in EU Investment Treaties (III)

- ▶ The draft text of the EU-Canada Investment Treaty (CETA – Canada-EU Free Trade Agreement) also provides for a special investment court consisting of
 - ▶ Permanent tribunal
 - ▶ Appeal tribunal
- ▶ Proceedings shall be conducted in an impartial and transparent manner
- ▶ However, open proceedings is not what is sought after by international investors



Prevention of Disputes (I)

- ▶ Obviously, before going to court or arbitration, parties are under an obligation to settle their dispute amicably
- ▶ Amicable settlement can be done through
 - ▶ High level negotiations between the parties
 - ▶ Mediation
 - ▶ Binding advice by an independent expert
- ▶ If a dispute cannot be solved amicably, in principle, there is no other option than arbitration, if the agreement so stipulates



Prevention of Disputes (II)

- ▶ ICSID published a document called “Practice Notes for Respondent in ICSID Arbitration” (2015), which contains a chapter on prevention of disputes
- ▶ In this regard, ICSID provides the following recommendations
 - ▶ Ensure that there is no conflict between domestic law and international legal obligations
 - ▶ Ensure that all government officials are aware of the State’s investment obligations
 - ▶ Engage regional and local authorities in then State’s investment obligations, too
 - ▶ Set up formal dispute prevention and management systems
 - ▶ Monitor recent developments in investment arbitration



Conclusions

